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

In the Matter of:	)	
Data Breach Reporting Requirements	)	WC Docket No. 22-21

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition ("VON")[1] hereby submits these comments filed in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM"),[2] which seeks comments on revisions to existing data breach disclosure requirements. Specifically, VON recommends that the Commission adopt an exemption from its privacy and data security rules (codified at 47 CFR 64.2001-64.2011) for enterprise customers of voice service providers who have contracts that specifically address data security and data breaches and provides a mechanism for the customer to communicate with the voice service provider regarding those matters. As discussed below, enterprise customers have different privacy and data security concerns and the capacity to protect their own interests in negotiations with service providers. Though this enterprise exemption was originally adopted in the Commission's 2016 order that was ultimately nullified by Congress,[3] this was an exemption and

[1] The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of IP enabled communications. VON Coalition members are developing and delivering voice and other communications applications that may be used over the Internet. For more information, see www.von.org.
[2] *Data Breach Reporting Requirements,* Notice of Proposed Rulemaking, WC Docket No. 22-21, (rel. Jan. 6, 2023); *see also* 88 Fed. Reg 3953 (Jan. 23, 2023) (establishing a comment deadline of February 22, 2023).
[3] *Protecting the Privacy of Customers of Broadband and other Telecommunications Services*, 31 FCC Rcd 13911 (2016) ("2016 Privacy Order"); *see also* Joint Resolution, Pub. L. No. 115-22 (2017) (disapproving the rules adopted in the 2016 Privacy Order).

not a rule; and, therefore, not otherwise impacted by the Congressional Review Act ("CRA") nullification.

BACKGROUND

The *2016 Privacy Order* created an enterprise customer exemption from Section 222 rules (specifically Part 64, Subpart U regarding Customer Proprietary Network Information ("CPNI")) under certain conditions.[4] In particular, the customer's contract with the voice service provider must specifically address the issues of transparency, choice, data security and data breaches, and provide a mechanism for the customer to communicate with the provider about privacy and data concerns.[5] The Commission confirmed that service providers would still be subject to the statutory requirement of Section 222 even when the exemption applied.[6] The Commission based the exemption on the fact that businesses may have different privacy and data security needs than individuals and are typically able to negotiate appropriate protections in their service agreements.[7] The enterprise customer exemption was described in the text of the *2016 Privacy Order*, but not otherwise addressed in Final Rules adopted in the Order.[8]

In the *NPRM*, the Commission seeks comment on the effect of the Congressional disapproval of the *2016 Privacy Order* under the Congressional Review Act.[9] The Commission clarifies that it is not seeking comments on reissuing the same rule or issuing a new rule that is

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[4] *2016 Privacy Order* at paras. 306-307 (noting that this exemption mirrored a similar exemption from CPNI authentication requirements in cases where the customer's contract was serviced by a dedicated account representative and specifically addressed the providers protection of CPNI). 47 CFR Subpart U is now codified in Sections 64.2001-64.2011.
[5] *Id.* at paras. 306, 308.
[6] *Id.* at paras. 306, 309 (noting in fn. 904 that, under the strictures of Section 222, providers would still be required to protect customer information, limit their use of carrier information and protect its confidentiality, and obtain customer approval before using, disclosing, or permitting access to CPNI for any reason other than providing voice services, or services necessary to or used in the provision of voice service.)
[7] *Id.* at para. 307.
[8] See, *Id.* at Appendix A.
[9] *NPRM.* at para. 52.

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substantially the same as the rule disapproved by Congress, but on the effect of Congressional disapproval for purposes of adopting rules that apply to service providers.[10]

DISCUSSION

The Commission in this proceeding should once again confirm the enterprise exemption for its CPNI rules. In the seven years since the release of the *2016 Privacy Order*, the governing relationship between voice service providers and enterprise customers have not changed. Sophisticated enterprise customers will negotiate service agreements that will address their specific customer privacy and security needs. These requirements will go well beyond the protections afforded individual customers by the CPNI rules, including with the inclusion of specific service level obligations providing enterprise customers monetary credits or termination rights for the service provider's failure to meet those obligations.

The Joint Resolution adopted by Congress in response to the *2016 Privacy Order* disapproves **"the rule" (emphasis added)** submitted by the Commission and does not more broadly address the language of the Order. Those rules may be found in Appendix A. As noted, the enterprise exemption is addressed in the text of the order but not in the Final Rules that would have otherwise been codified in the Code of Federal Regulations but for the Joint Resolution. As described by the U.S. Government Accountability Office ("GAO"), the CRA requires GAO to report on major rules that federal agencies make; and those rules must be submitted by the agencies to both houses of Congress and GAO before they can take effect.[11] In this instance, the enterprise exemption was an unintended victim of the CRA; a policy that on its

[10] *Id.*
[11] See Congressional Review Act | U.S. GAO (last visited February 15, 2023). The CRA defines a major rule as one that has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. § 804(2).

own sough to address the inappropriateness of applying the CPNI rules to the relationship between service providers and enterprise customers.

The procedure by which agencies must submit rules to Congress is instructive. Under the CRA, "a federal agency promulgating a rule must submit a copy of the rule and a brief report about it to each House of Congress and to the Comptroller General before the rule can take effect. In addition to a copy of the rule, the report shall contain a concise general statement relating to the rule."[12] As noted herein, the enterprise exemption is found in the text of the order—not in the Final Rules as adopted by the Commission and sent to Congress—so Congress's disapproval was not intended to touch text of the order not reflected in the Final Rules. It is likely that the 265 Senators and Representatives who voted in favor of the Joint Resolution cast their votes based on the Final Rules and not on a somewhat peripheral issue treated by a few paragraphs in a 219-page order. Had the drafters of the CRA intended for that act to allow for repeal of the full text of agency orders, the drafters would have written the bill to reflect that; the plain language of the CRA confirms that was not their intent. As defined, the enterprise exemption to the CPNI obligations would not be considered a major rule either requiring submission to the GAO or otherwise subject to the CRA. If it was subject to the CRA, Congress could pass a joint resolution of disapproval.[13]

[12] 142 Cong. Rec. 8200 (1996). Because the CRA was not the product of the congressional committee process, traditional legislative history and legislative intent is unavailable. Senator Don Nickles (R-Okla.) submitted, on his own and the bill sponsors' behalf, a joint statement for the Congressional Record "intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms." This statement also makes clear that Congress may use the CRA to disapprove of rules found "to be too burdensome, excessive, inappropriate or duplicative."

[13] See 5 U.S.C. §§ 801(a)(3)(B), 802.

The Commission, therefore, is not restricted by the CRA in this proceeding from once again adopting an enterprise exemption to the CPNI rules.[14] In contrast to what's defined as a major rule, the enterprise exemption will not have an impact on the economy of $100 million or more; will not increase costs for consumers or individual industries; or, have an adverse effect on competition, investment, productivity or innovation. The enterprise exemption will benefit both customers and service providers who can best address specific requirements for customer privacy and data security within negotiated agreements rather than be constrained by rules intended to protect individual consumers.

CONCLUSION

For the foregoing reasons, the Commission should act in accordance with the recommendations herein.

Respectfully submitted,

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February 22, 2023

[14] Once a rule has been the subject of Congressional disapproval, the CRA prohibits an agency from reissuing the rule in substantially the same form, or issuing a new rule that is substantially the same as the disapproved rule. That is not the case here.