

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Safeguarding and Securing the Open Internet)
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WC Docket No. 23-320



**COMMENTS OF CONSUMER REPORTS
December 14, 2023**

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I. INTRODUCTION

Consumer Reports (CR)¹ has long supported a fair and open internet, and the basic principles of net neutrality that underlie it. As such, CR backed the Federal Communications Commission's (FCC) *2015 Open Internet Order* which appropriately classified broadband internet access service (BIAS) for what it is, a telecommunications service, and laid out a common sense framework to ensure an open internet.² Though challenged by the internet service provider (ISP) industry, the *Open Internet Order* was upheld by a federal appeals court in 2016 and many of us, perhaps naively, considered the issue of net neutrality settled once and for all.

Unfortunately, that was not to be the case, when under new leadership in 2017, the Commission abruptly shifted course under tenuous reasoning when it proposed and adopted the *Restoring Internet Freedom Order*, an action strongly opposed by CR and many others.³ Among other things, the *RIF Order* repealed the bright line rules of no blocking, no throttling, and no paid prioritization. It did away with the voluntary consumer broadband label which was meant to inform consumers about their broadband service and how much it costs. And by declassifying

¹ Consumer Reports is an independent, nonprofit membership organization that works side-by-side with consumers to create a fairer, safer, and healthier world since 1936, and has been actively engaged with policymakers to increase broadband access and affordability for all consumers.

² *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*2015 Open Internet Order*). See also: Comments of Consumers Union, MB Docket No. 14-28 (filed July 15, 2014), available at: <https://www.fcc.gov/ecfs/document/6017984455/1>; and Reply Comments of Consumers Union, MB Docket No. 14-28 (filed September 15, 2014), available at: <https://www.fcc.gov/ecfs/document/6019149099/1>.

³ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) (*RIF Order*). See also: Comments of Consumers Union, MB Docket No. 17-108 (filed July 17, 2017), available at: <https://www.fcc.gov/ecfs/document/10717721316462/1>; Reply Comments of Consumers Union, MB Docket No. 17-108 (filed August 30, 2017), available at: <https://www.fcc.gov/ecfs/search/search-filings/filing/10831277255624>.

BIAS as an information service, the FCC walked away from its role overseeing broadband, resulting in a perverse outcome where an increasingly vital service was largely unregulated by anyone in the federal government.

In the intervening years since the *RIF Order* removed the FCC from its duty to regulate BIAS, the importance of broadband in the everyday lives of consumers has only increased as the *Notice of Proposed Rulemaking* (NPRM) we consider today points out.⁴ Of course, if there was any doubt of the crucial role broadband plays in early 21st century life, the COVID-19 pandemic made it all too clear when stay-at-home orders forced many of us to work from home, learn from home, visit with loved ones, and receive medical care via telehealth services all of which rely on a reliable broadband connection that families can afford.

When considering all of the issues identified in the *NPRM* that broadband touches everyday, whether its public safety, national security, broadband access and deployment, and of course, consumer protection (which CR is well positioned to address), there is an urgent need to re-establish broadband as a telecommunications service and the Commission as the appropriate agency to ensure a fair and open internet for consumers and businesses alike.

II. CONSUMER USAGE and PERCEPTIONS OF BROADBAND SERVICE

CR agrees with the Commission's belief stated in the *NPRM* that:

[t]he COVID-19 pandemic dramatically changed the importance of the Internet today, and seek comment on our belief. Not unlike other essential utilities, such as electricity and water, BIAS connections have proved essential to every aspect of our daily lives, from work, education, and healthcare, to commerce, community, and free expression.⁵

⁴ *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking at para. 17 (October 20, 2023) (*hereafter NPRM*). Available at: <https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf>.

⁵ *Id.*

Indeed, CR has been conducting survey data to gauge consumer usage and perceptions of internet service dating back to when the rulemaking leading to the *RIF Order* was being contemplated in 2017. Examining the results of these surveys affirms the Commission’s conclusion that broadband has grown in importance in the past five years, and a majority of consumers equate its importance to that of electricity and water service.

Six CR surveys regarding broadband inform this conversation. All were nationally representative in scope, and were conducted in 2017⁶, 2020⁷, 2021 (two surveys, one in February⁸ and one in June⁹), 2022¹⁰, and most recently in October of 2023.¹¹ Comparing the results from the same questions asked is revealing. For example, three of those surveys queried consumers how often they rely on the internet. In 2017, 68 percent of Americans said they relied upon the internet seven days a week. When asked a similar question in October of 2023, that number jumped to 85 percent, up from 75 percent from February of 2021, as shown in the figure below.

⁶ July 2017 Consumer Reports nationally representative Net Neutrality phone survey of 1,005 US adults, *available at*: <https://innovation.consumerreports.org/wp-content/uploads/2023/02/Consumer-Reports-Net-Neutrality-Survey-August-2017-Digital-Lab.pdf>.

⁷ April 2020 Consumer Reports nationally representative American Experiences Survey of 2,164 US adults, *available at*: https://article.images.consumerreports.org/image/upload/v1666112268/prod/content/dam/surveys/Consumer_Reports_AES_Internet_Only_April_2020.pdf.

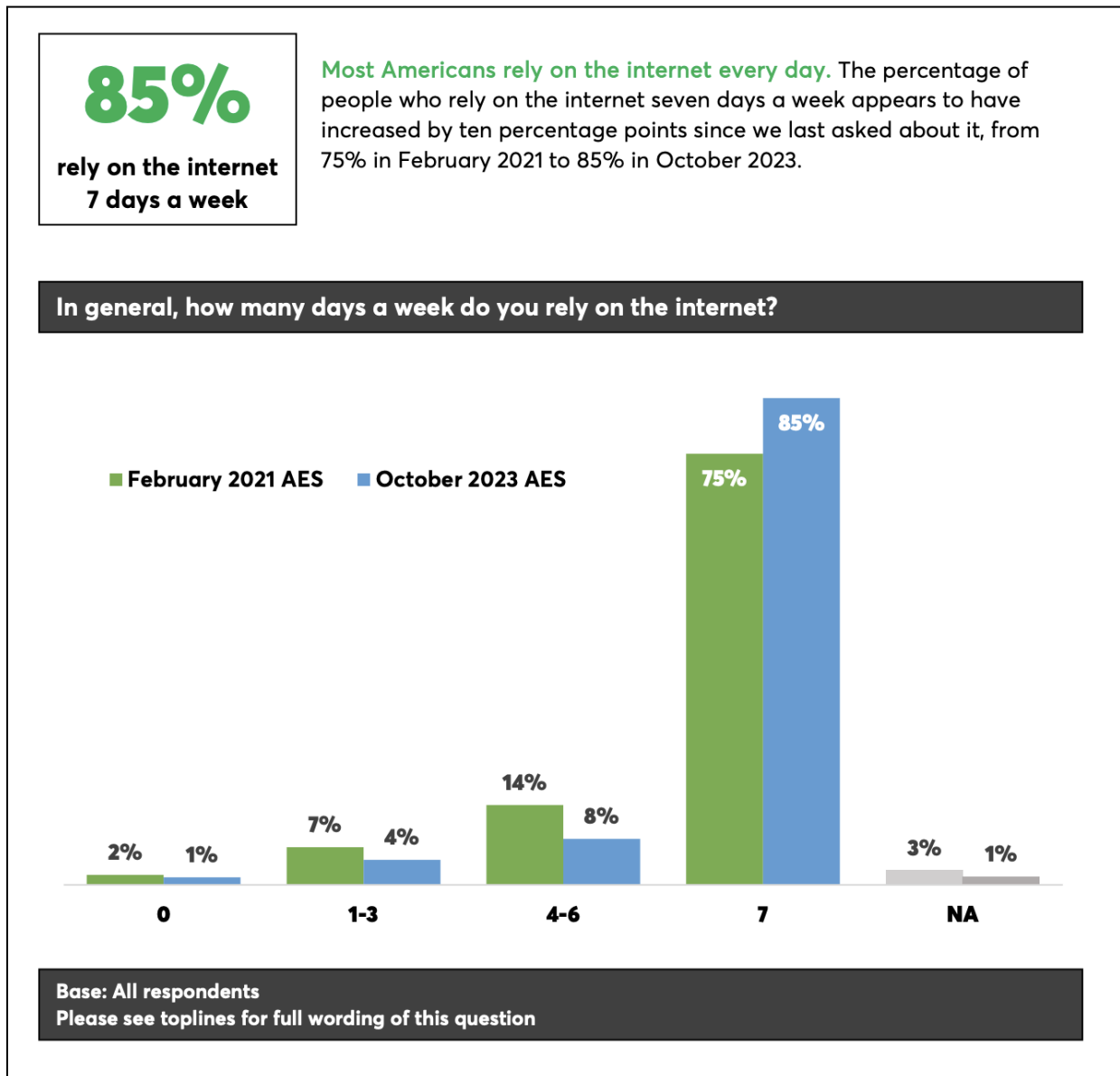
⁸ February 2021 Consumer Reports nationally representative American Experiences Survey of 2,514 US adults, *available at*: http://article.images.consumerreports.org/prod/content/dam/surveys/Consumer_Reports_American_Experiences_Survey_February_2021.

⁹ June 2021 Consumer Reports nationally representative Broadband survey of 2,565 US adults, *available at*: http://article.images.consumerreports.org/prod/content/dam/surveys/Consumer_Reports_Broadband_June_2021.

¹⁰ May 2022 Consumer Reports nationally representative American Experiences Survey of 2,076 US adults, *available at*: https://article.images.consumerreports.org/prod/content/dam/surveys/Consumer_Reports_AES_May_2022.pdf.

¹¹ October 2023 Consumer Reports nationally representative American Experiences Survey of 2,087 US adults, *available at*: https://article.images.consumerreports.org/image/upload/v1698589747/prod/content/dam/surveys/Consumer_Reports_AES_October_2023.pdf.

Figure 1¹²



To state the obvious, these survey results demonstrate that the percentage of consumers who rely on the internet everyday has increased substantially—certainly since 2018 as asked by the *NPRM*

¹² October 2023 Consumer Reports nationally representative American Experiences Survey Report, Broadband section, available at: http://advocacy.consumerreports.org/wp-content/uploads/2023/12/Survey_Consumer-Reports_-2023-AES-Broadband.pdf.

and even since the onset of the pandemic in 2020.¹³ These numbers suggest that this trend will continue to increase in the future.

Similarly, a CR survey taken in June of 2021 also lends support to the Commission’s assertion that consumers rely more on broadband service because of the pandemic, finding that 43 percent of consumers “say they are currently using internet more in their household now compared to before the COVID-19 pandemic began.”¹⁴ That same survey found that “sixteen percent of Americans with broadband in their household say they had to upgrade their internet package to accommodate their household’s needs since the pandemic began in early March 2020.”¹⁵

In addition to increased usage, consumers’ view of internet service has also changed significantly since 2018 and since the pandemic began in 2020. CR first asked consumers the following question as part of a nationally representative survey we conducted to gauge consumers’ views on net neutrality in 2017: “To what extent do you agree or disagree with the following statement? Internet service is as important as electricity or water service in today’s world.”¹⁶ Sixty-one percent of Americans agreed with that statement at the time.

CR asked that same question four more times since 2017, and the percentage of Americans who agreed that internet service is as important as electricity or water surpassed 70 percent all four times, with 78 percent of consumers agreeing with the statement in October of

¹³ *NPRM* at para. 17.

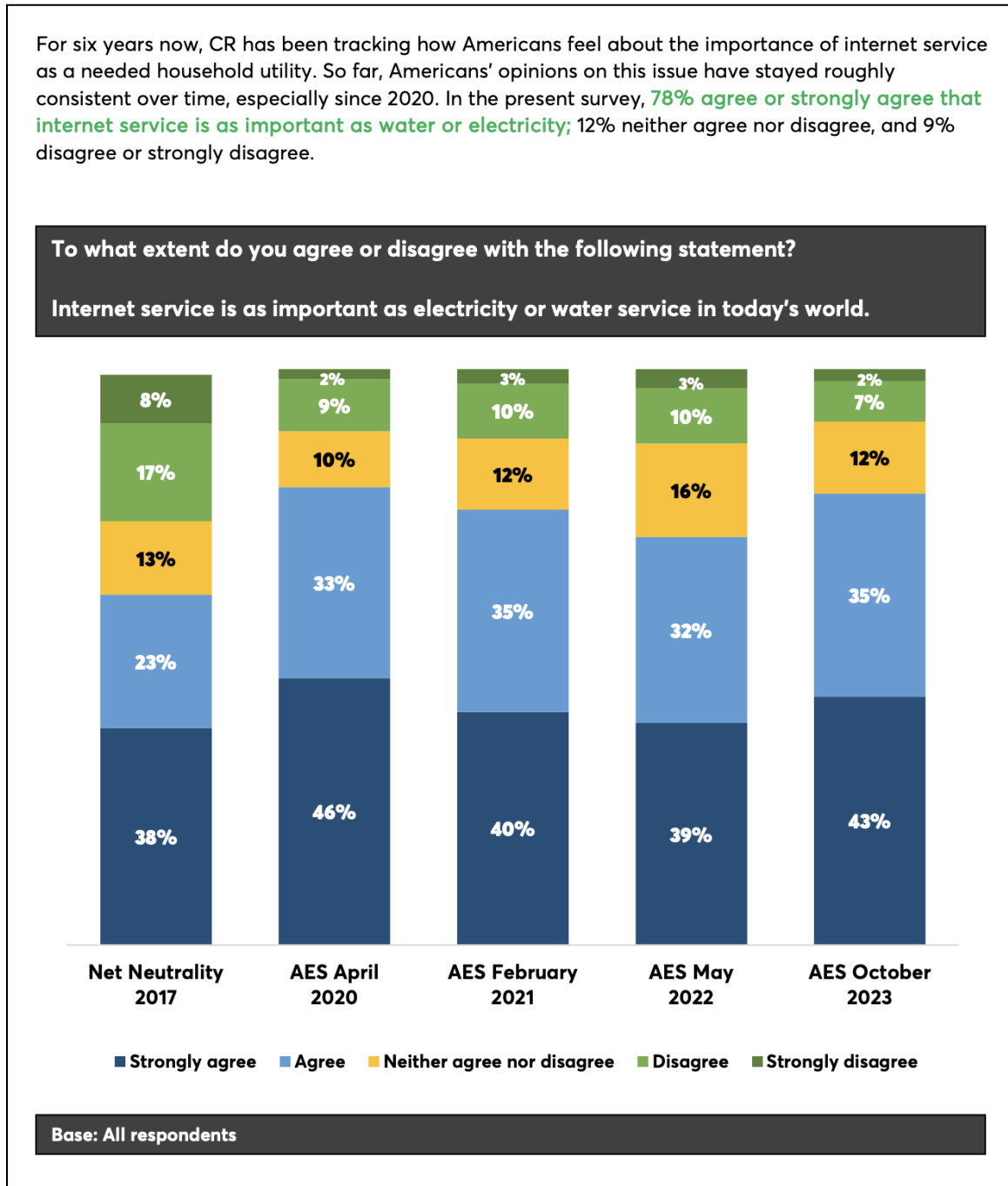
¹⁴ June 2021 Consumer Reports nationally representative Broadband survey report, *available at*: https://advocacy.consumerreports.org/wp-content/uploads/2021/08/CR_Broadband-Survey_8_2021_VF.pdf.

¹⁵ *Id.*

¹⁶ July 2017 Consumer Reports nationally representative Net Neutrality phone survey of 1,005 US adults, *available at*: <https://innovation.consumerreports.org/wp-content/uploads/2023/02/Consumer-Reports-Net-Neutrality-Survey-August-2017-Digital-Lab.pdf>.

2023. Figure 2 excerpted from the 2023 survey report displays and compares the results from the five surveys that asked this question.

Figure 2¹⁷



¹⁷ October 2023 Consumer Reports nationally representative American Experiences Survey Report, Broadband section, *available at*: http://advocacy.consumerreports.org/wp-content/uploads/2023/12/Survey_Consumer-Reports_-2023-AES-Broadband.pdf.

These numbers make clear that more than three out of four consumers currently view internet service as an essential utility on par with water or electricity service. Though this does not automatically mean that broadband should be regulated as a utility, the case can be made—and CR would strongly agree—that these numbers justify the Commission acting to classify broadband as a Title II telecommunications service with common carrier rights and obligations.

Finally, consumers supported net neutrality rules in the past and large numbers continue to do so today.¹⁸ A week ago on December 7, 2023, CR launched an online petition to solicit consumer engagement on the issue of securing an open internet related to the current proceeding.

The petition read:

High-speed internet is critical to American life – most of us need it to work, attend classes, buy groceries, or get medical care. Yet unlike other essential utilities like electricity, water and home-phone service, there are no rules to hold giant broadband providers accountable to consumers. Sign our petition supporting the FCC’s ability to set strong rules that will ensure consumers are protected from companies slowing down your internet speeds, or even blocking your access to competitor’s websites.

To date, nearly 33,000 consumers have signed the petition in support of the Commission's efforts and the rules proposed in the *NPRM*.¹⁹

¹⁸ See July 2017 Consumer Reports nationally representative Net Neutrality phone survey of 1,005 US adults, *available at*: <https://innovation.consumerreports.org/wp-content/uploads/2023/02/Consumer-Reports-Net-Neutrality-Survey-August-2017-Digital-Lab.pdf>. “57 percent support net neutrality regulations. Over half of Americans say that they support the current net neutrality regulations that prohibit ISPs from blocking or discriminating against lawful content on the internet (31% strongly support; 26% somewhat support). Sixteen percent oppose these regulations, and about a quarter did not express an opinion.”

¹⁹ CR’s online petition is *available at*: <https://action.consumerreports.org/nb-20231207-netneutrality>.

III. THE NEED FOR PRIVACY PROTECTIONS TO APPLY TO BROADBAND

Consumer Reports also supports the decision to reclassify broadband as a telecommunications service because it would restore stronger privacy protections to the consumer personal information processed by broadband providers.

Since the *RIF Order*, the data associated with broadband service is subject only to the protections of Section 5 of the Federal Trade Commission Act, which broadly proscribes the use of “deceptive or unfair business practices.” While the Federal Trade Commission (FTC) has interpreted and enforced this law to prohibit certain data practices, the majority of the FTC’s privacy cases are predicated on violations of an affirmative privacy promise made by a company in a privacy policy or other documentation. That is, the FTC typically only brings a case in the event that a company violates its own self-imposed privacy rules.²⁰

If a company simply declines to set clear restrictions on its collection and use of data in a privacy policy, the FTC is far less likely to argue that privacy-invasive practices are violative of Section 5. While the FTC has increasingly argued in recent years that certain data behaviors are inherently “unfair” under Section 5 regardless of any privacy representations, the extent to which Section 5 protects the confidentiality of consumer data is unclear. While the FTC has initiated a rulemaking on commercial surveillance to provide greater clarity on what behaviors are prohibited by Section 5,²¹ the agency has not yet drafted, let alone finalized substantive rules, and

²⁰ Press Release, *FTC Charges Twitter with Deceptively Using Account Security to Sell Targeted Ads*, Federal Trade Commission, Bureau of Consumer Protection (May 25, 2022) available at: <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-charges-twitter-deceptively-using-account-security-data-sell-targeted-ads>.

²¹ *Trade Regulation Rule on Commercial Surveillance and Data Security*, Advanced Notice of Proposed Rulemaking, Federal Trade Commission (August 22, 2022), available at: <https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security>.

the process for doing so is likely to take several years (setting aside any potential legal challenges).

On the other hand, reclassification would put consumer's broadband data under the protections of Section 222 of the Communications Act, which would provide better certainty and stronger protections. Unlike Section 5, Section 222 states that providers have an affirmative duty of confidentiality over customer data, and limits data processing to what is reasonably necessary to provide the services requested by a consumer.

This principle of *data minimization* accords data processing with the reasonable expectations of the consumers, and does not force consumers to affirmatively seek out and use privacy controls to protect their personal data. Strong default protections are especially necessary when it comes to broadband service, where consumers typically do not have many alternative options, and service providers insulated from robust competition are incentivized to monetize data in ways that may be contrary to consumers' preferences and interests.

Finally, we urge the Commission to narrowly tailor any preemption of state privacy protections to those rules that are directly contrary to the rules prescribed by the Commission. States should be empowered to layer additional protections on top of the Commission's baseline rules to protect their citizens as they see fit. The need to allow the states to craft their own protections is exacerbated by the inconsistent manner the issue has been handled at the federal level—from classification as a Title II service in the *Open Internet Order of 2015*, to undoing that classification in the *RIF Order*, to this current proceeding which appropriately considers a return to Title II.

While federal policy on broadband regulation has swung wildly back and forth, states can offer more reliable and enduring protections. This is especially the case for the privacy protections afforded by the California Privacy Protection Act, enacted by a ballot initiative that explicitly provides that the legislature lacks the statutory authority to substantively weaken the law’s provisions.²² Thus, the FCC should only preempt state rules that impose specific conflicting mandates on companies, instead of preempting additional protections that the states imposed for the good of their citizens.

IV. CONCLUSION

Restoring the FCC’s authority over broadband will benefit consumers and provide the necessary oversight over what has become an essential service in our everyday lives. Classified appropriately as a telecommunications service, it naturally falls to the Commission as the expert agency over such services for nearly a century to assume this role. Had the Commission not erred in stepping away from this responsibility when it enacted the *RIF Order*, today’s exercise would not be necessary. But it is necessary.

A recent editorial in the *Washington Post* entitled “*Finally Some Rules for the Internet*” succinctly captures the urgency of this proceeding:

What, exactly, net neutrality rules look like matters less than that there are meaningful rules for broadband more generally. Broadband is an essential service. The coronavirus pandemic proved that much by forcing students and workers to rely on their WiFi connections to learn and to earn a living — and, worse, by consigning those without reliable connections to camp out at public libraries or in parking lots to log on. Yet there isn’t a single government agency with sufficient authority to oversee this vital tool.²³

²² California Consumer Privacy Act, Section 3(c)(6).

²³ Editorial Board, “*Finally Some Rules for the Internet*” *Washington Post* (October 28, 2023), *available at*: <https://www.washingtonpost.com/opinions/2023/10/28/net-neutrality-internet-fcc/>.

The internet is indeed a vital tool and plays an increasingly important role in so many ways in the daily lives of Americans. CR survey results dating back to 2017 demonstrate just how true this is and how consumers view broadband as an essential utility. These reasons justify Commission action that is very much supported by Consumer Reports.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JS' or similar initials, positioned above the printed name.

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