

**STATE OF RHODE ISLAND
PROVIDENCE, SC.**

SUPERIOR COURT

CoxCom LLC, d/b/a COX
COMMUNICATIONS,
Plaintiff,

v.

RHODE ISLAND COMMERCE
CORPORATION,
Defendant.

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No. PC-2024-____

COMPLAINT

Introduction

Plaintiff CoxCom, LLC d/b/a Cox Communications (“Cox”) seeks a declaratory judgment and injunctive relief that prohibits the Defendant Rhode Island Commerce Corporation (“Commerce Corporation”) from using flawed internet speed data that the Commerce Corporation refuses to make public to build taxpayer-subsidized and duplicative high-speed broadband internet in affluent areas of Rhode Island like the Breakers Mansion in Newport and affluent areas of Westerly. Rather than using taxpayer funds to ensure high-speed access to all Rhode Islanders – including low-income Rhode Islanders in need – the Commerce Corporation has devised a program that will benefit wealthy parts of the State already served with high-speed internet in contravention of the program that it purports to implement. It does so while keeping secret its own data, and refusing to consider Cox’s speed data showing the opposite.

The Commerce Corporation also devised a process to challenge its flawed data – data that is at odds with publicly-available speed data, Cox’s own data, and the FCC’s Broadband Map – that exists nowhere else in the 18 states where Cox offers service and that is impossible for Cox to meet. It would require Cox to have technicians fan out across Rhode Island and manually test thousands of its customers’ internet connections at their homes between the hours of 7 p.m. to 11

p.m. on three separate occasions. Under the Commerce Corporation's overly burdensome and irrational scheme, each test in a census block group must be performed simultaneously, so if one Cox customer refused access to a Cox technician at their home during the evening hours, the test for the entire census block group would be invalid. Even if Cox dedicated every one of its technicians across the country at exorbitant expense to come to Rhode Island, it could not satisfy the Commerce Corporation's arbitrary and irrational testing challenge scheme.

The Commerce Corporation has continued to keep hidden the data used to develop this flawed process and refuses to accept Cox's data, instead insisting that Cox satisfy the impossible-to-meet challenge process. It has also rejected all of Cox's many reasonable attempts to resolve these issues. Cox respectfully requests declaratory and injunctive relief as provided below and states as follows:

Parties and Venue

1. Plaintiff CoxCom, LLC d/b/a Cox Communications ("Plaintiff" or "Cox"), is a foreign limited liability company that maintains an office at 9 J. P. Murphy Industrial Highway, West Warwick, Rhode Island, 02893.

2. Defendant Rhode Island Commerce Corporation ("Commerce Corporation") is a state corporation organized under the laws of Rhode Island.

3. This Court has jurisdiction under R.I. Gen. Laws §§ 8-2-13, 8-2-14, 9-30-1, 42-35-7, 42-35-8 and 42-35-15.

4. Venue is appropriate in this Court pursuant to R.I. Gen. Laws §§ 9-4-3, 9-4-4 and 42-35-15.1.

Facts

5. On November 15, 2021, President Biden signed the Infrastructure Investment and

Jobs Act (“IIJA”) into law.

6. Among other things, the IIJA appropriated roughly \$42.5 billion to the United States Department of Commerce for the Broadband Equity, Access and Deployment Program (“BEAD”) to be allocated by the National Telecommunications and Information Administration (“NTIA”) to the states and territories (“states”).

7. The State of Rhode Island has been allocated \$108.7M for the BEAD program.

8. BEAD funds are to be used by the states to fund broadband deployment projects targeted to (1) unserved, (2) underserved and (3) community anchor institutions, with priority to unserved areas. BEAD funds may also be used by the State of Rhode Island for nondeployment activities, including affordability, digital equity and other state priorities.

9. For purposes of the BEAD program, IIJA defines “unserved” as having less than 25 mbps download and 3 mbps upload speeds (“25/3”) and “underserved” as having less than 100 mbps download and 20 mbps upload speeds (“100/20”).

10. Speeds at or above 100 mbps download and 20 mbps upload are considered “served” under the BEAD program.

11. NTIA has made clear that BEAD funding can only be applied when funding is “necessary,” and BEAD funding is not considered “necessary” where a project area is already served or subject to an enforceable broadband deployment commitment.

12. According to the Broadband Availability Map published by the Federal Communications Commission (“FCC”), Rhode Island is 99.3% served, meaning that the FCC has determined that only 00.7% of Rhode Island is unserved or underserved.

13. States are required to submit plans for approval by the NTIA on the process and methodology for determining areas targeted for funding, and the process for awarding those

funds.

14. Cox is the fifth largest internet service provider and the largest private broadband company in America, proudly serving nearly seven million homes and businesses across 18 states. It has made a \$400 million investment to bring symmetrical gigabit broadband connectivity to more than 100,000 unserved and underserved households across the United States.

15. Cox has hundreds of employees in Rhode Island and regularly invests in the State. Earlier this year, a total of \$110,000 in Cox Charities grants were awarded to 13 nonprofit organizations, funding various innovative projects supporting STEAM (Science, Technology, Engineering, Arts, and Math) initiatives. In 2023, Cox donated more than \$1.6 million in cash and in-kind support to non-profits throughout Rhode Island.

Rhode Island Already Has Best in Nation Internet Infrastructure

16. Rhode Island is one of the most connected states in the United States for existing high-speed broadband internet infrastructure.

17. According to Governor Daniel J. McKee, in comments to the Rhode Island Broadband Advisory Council on March 7, 2023, “Rhode Island is one of the most connected states in the country now.”

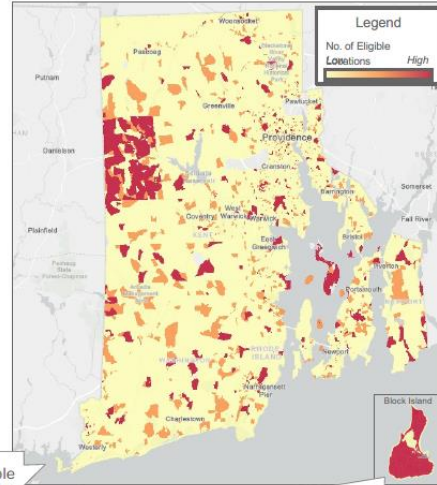
18. According to Secretary of Commerce Elizabeth Tanner (“Secretary Tanner”), in comments to the Rhode Island Broadband Advisory Council on March 7, 2023, “Rhode Island has a strong broadband backbone.”

19. The Commerce Corporation’s own maps, as reflected in the minutes of the Rhode Island Broadband Advisory Council on November 14, 2023, indicate that only small areas of Rhode Island are unserved or underserved:

Eligible Locations

Locations eligible for deployment funds:

Type	Location Type	Speed Threshold	Latency Threshold
Unserved	Residential or Business	< 25 Mbps / 3 Mbps	> 100ms
Underserved	Residential or Business	>= 25 Mbps / 3 Mbps < 100 Mbps / 20 Mbps	> 100ms
Community Anchor Institutions (CAIs)	Community institutions that help expand broadband access to the broader community, such as schools and libraries	< 1 Gbps / 1 Gbps	> 100ms



The Corporation will continue to identify eligible locations and will publish an official list of eligible locations before the Challenge Process.

Block Island's Broadband BI coverage is not yet represented in the National Broadband Map, but will be incorporated in the next iteration

20. In March 2022, Cox increased the download speeds of the Connect2Compete and StraightUp Internet tiers from 50Mbps to 100Mbps. In June 2022, Cox increased the download speeds of the Essential Classic tier from 50Mbps to 150Mbps. In total, about 14% of Cox customers in Rhode Island received a speed increase in 2022.

21. In June 2023, Cox increased the speeds of the Essential Classic and Preferred tiers. Essential Classic increased from 150Mbps to 250Mbps. Preferred increased from 250Mbps to 500Mbps. In total, about 53% of Cox customers in Rhode Island received a speed increase in 2023.

22. As of June 30, 2024, 100% of Cox-served homes in Rhode Island were eligible for one (1) gigabit broadband speeds, well over the 100/20 threshold for “served” under the BEAD program.

23. As of June 30, 2024, 99.8% of Cox-served homes in Rhode Island were eligible for two (2) gigabit broadband speeds, well over the 100/20 threshold for “served” under the

BEAD program.

The Federal Programs Are Designed to Provide Access To The Internet, Not To Build Redundant Infrastructure Where Internet Already Exists

24. The federal programs that authorize funding for broadband infrastructure in the IIJA and the American Rescue Plan Act of 2021 (“ARPA”) are designed to authorize new infrastructure for places that are unserved or underserved with internet access.

25. In Rhode Island, communities such as Little Compton, Foster and Prudence Island are unserved or underserved with internet access.

26. The federal programs in the IIJA and ARPA are not designed to build redundant and taxpayer-subsidized broadband infrastructure where it already exists through private investment.

27. Contrary to the Commerce Corporation’s flawed process, high-speed broadband internet access already exists for residents in Barrington, Aquidneck Island, Jamestown, and Westerly, and in all other communities in Rhode Island where Cox provides residential and commercial broadband internet.

Affordable Internet is an Issue in Some Parts of Rhode Island, Particularly Where the Median Home Value is Not Over \$1 Million Dollars

28. Affordable internet access is a significant issue for low-income Rhode Island residents. According to the Commerce Corporation’s Digital Equity Plan, “[a]ffordability was the most frequently cited challenge to broadband access by survey and focus group participants.”

29. During the COVID-19 pandemic, the United States Congress authorized an Affordability Connectivity Program that provided subsidies to lower-income persons to purchase existing broadband internet. Congress did not reauthorize the program and it was anticipated to end in May 2024. According to the Commerce Corporation, as of March 2024, the State of

Rhode Island had an enrollment rate of 48% of eligible Rhode Island households in the Affordable Connectivity Program - or 83,514 of 173,369 eligible households - which is the highest percentage in New England.

30. The BEAD program does not authorize deployment of new internet broadband infrastructure for locations that are already served.

31. Subsidies for affordable internet access for low-income residents is an eligible program use for the BEAD program.

32. Nevertheless, upon information and belief, the Commerce Corporation does not plan to use any of the \$108.7M funds for the BEAD program on providing affordable internet access subsidies to low-income Rhode Islanders where high-speed broadband internet already exists.

The Rhode Island Program

33. The Commerce Corporation has been designated as the entity to allocate and administer the State of Rhode Island's BEAD funding and devising a procedure for challenges.

34. Under the BEAD Challenge Policy Notice from NTIA, the challenge process must be "fair," with "an approach that ensures that sufficient opportunity and time is given to all relevant parties to initiate, rebut, and substantiate challenges," (section 7.5 of the policy), and there must be "sufficient justification" that the modifications to the national map "more accurately reflect the locations eligible for BEAD funding." (Section 6.1 of policy). See BEAD Challenge Policy Notice, attached hereto as Exhibit 1. Similarly, the federal statute on challenging broadband maps (47 U.S.C. § 642(b)(5)) requires consideration of "the need to mitigate the time and expense incurred by, and the administrative burdens placed on" entities like Cox in challenging the accuracy of a coverage map.

35. NTIA provided a recommended model challenge process that it encouraged eligible entities to use; despite that encouragement the Commerce Corporation chose not to use the model challenge process.

36. Instead, the Commerce Corporation established significantly higher thresholds that are inconsistent with, and considerably more onerous than those adopted by every other state or territory eligible for BEAD funding where Cox offers high-speed internet and every state in New England. The Commerce Corporation has the power to waive application of its testing thresholds as part of the challenge process. The relevant statute explicitly contemplates that the Commerce Corporation will need to make modifications to Volume 1 as a result of executing the challenge process. 47 U.S.C. § 1702(h)(2)(C).

Rhode Island's Challenge Process

37. The Commerce Corporation's Rhode Island Broadband Map challenge process is set forth in the Commerce Corporation's Broadband Equity, Access, and Deployment (BEAD) Program, Initial Proposal, Volume 1 (May 1, 2024) ("Volume 1"). A true and accurate copy of Volume 1 is attached hereto as Exhibit 2.

38. Specifically, Section 1.4 of Volume 1 sets forth the Commerce Corporation's Broadband Challenge Process for Rhode Island.

39. Section 1.4.6.6 of Volume 1, Speed & Latency Test Requirements, page 45 to 46, provides that:

An ISP may rebut an Area Challenge lodged with download or upload speed tests as evidence or an Area Speed Test Reclassification lodged with download speed tests by providing speed tests, in the manner described above, for at least 75 percent of the ISP's customers in the challenged area. The customers must be randomly selected.

To ensure networks meet the standards established by NTIA when Rhode Islanders use networks concurrently, ISPs must administer speed tests

simultaneously for all tested BSLs within the area subject to the rebuttal. When evaluating speed tests provided by ISPs, the Corporation will apply the 80/80 rule, i.e., 80 percent of these locations must experience a speed that equals or exceeds 80 percent of the speed threshold (the 80/80 threshold is drawn from the requirements in the CAF-II and RDOF measurements. See BEAD NOFO at 65, n. 80, Section IV.C.2.a). For example, 80 percent of these locations must have a download speed of at least 20 Mbps (that is, 80 percent of 25 Mbps) and an upload speed of at least 2.4 Mbps to meet the 25/3 Mbps threshold and must have a download speed of at least 80 Mbps and an upload speed of 16 Mbps to meet the 100/20 Mbps speed tier.

An ISP may rebut an Area Challenge lodged with latency tests as evidence or an Area Speed Test Reclassification lodged with latency tests by providing latency tests, in the manner described above, for at least 75 percent of the ISP's customers in the challenged area. The customers must be randomly selected. To ensure networks meet the standards established by NTIA when Rhode Islanders use networks concurrently, ISPs must administer latency tests simultaneously for all tested BSLs within the area subject to the rebuttal. When evaluating latency tests provided by ISPs, the Corporation will apply the 95 percent rule (see NTIA BEAD Notice of Funding Opportunity at 65). Under that rule, if less than or equal to 95 percent of latency tests show download and upload latency measurements of 100 milliseconds or less, the Corporation will not accept an ISP's rebuttal.

40. After Cox filed an Access to Public Records Act (APRA) request with the Commerce Corporation on May 16, 2024, Rhode Island's approved Volume 1 plan was released to Cox on May 21, 2024.

41. Rhode Island's approved Volume 1 plan is dated May 1, 2024. Cox did not know the contents of Volume 1 and the Commerce Corporation's broadband challenge requirements until Cox received the response to the APRA request on or about May 21, 2024. Because the challenge process is different from the process the Commerce Corporation shared in its initial draft for public comment, Cox was not provided an opportunity to provide public comments on the challenge process that the Commerce Corporation is now implementing in the Volume 1 plan.

42. Among other things, Volume 1 includes Rhode Island's plan for identifying

unserved and underserved areas.

43. Rhode Island's Volume 1 includes the process whereby eligible entities (e.g. ISPs, state and local governments, and non-profits) can submit challenges for locations deemed by the Commerce Corporation on its map to be "served."

44. NTIA's guidance includes speed as a challenge type, and clarifies that for purposes of speed test challenges, the speed test shall be conducted on at least 10% of the locations, and no sooner than 60 days prior to the commencement of the challenge period.

45. The Commerce Corporation published its Volume 1 Broadband Map on or about May 29, 2024, which showed significant reclassifications made by the Commerce Corporation from the Broadband Availability Map published by the FCC.

46. Upon information and belief, prior to the release of its Volume 1 Broadband Map, the Commerce Corporation layered Ookla speed test data from the past 12 months over the FCC map, and "reclassified" as "underserved" any location which had a speed test result of less than 100 mpbs, and also reclassified some locations as "underserved" within census block groups based on Ookla speed test data that did not pertain to any specific location.

47. The information which Ookla makes publicly available is inconsistent with the reclassifications made by the Commerce Corporation. According to the Ookla Speedtest Global Index, April 2024, "[a]t the state level, Rhode Island showed the fastest median download speeds over fixed broadband in the U.S. during Q4 2023 at 257.48 Mbps." The same index showed Cox as having the fastest median download speeds in Rhode Island at 264.94 Mbps, more than two and a half times the threshold set by the Commerce Corporation.

48. According to Ookla's own staff, there is a difference between the broadband speeds that a consumer perceives and the service that the consumer actually receives. The most

common connection that consumers test on Ookla is Wi-Fi, and most of the customer-owned Wi-Fi routers that people have in their homes are older devices that are not capable of actually handling the throughput speeds that are being delivered through fiber or hybrid fiber-coaxial.

49. Ookla tests are run from a device on the consumer's home network. The device's innate capabilities may affect the speed test results, as well as the home network conditions that the device uses to connect to the network. Ookla speed tests do not provide the full consistent picture of a consumer's speed and connectivity experience. The speed test results do not capture the customer's internet experience throughout the day, or the actual speed delivered to the entire home versus the device itself performing the speed test, which could be affected by the age of the device and the number of other connected devices in the home.

50. According to FCC Chairwoman Jessica Rosenworcel, it is not easy to verify fixed broadband speeds because where a consumer places a router can have a significant impact on the level of service. Similarly, according to Ookla's own staff, the farther a user is from the router, the more the router's signal will naturally weaken. If the signal must pass through walls or furniture, it can degrade even over a short distance. Placing the router near a television can also cause interference. Because of the wide variability in residential environments, there is no practical way for an internet service provider to indicate the network performance that will be experienced within a particular home.

51. According to the Commerce Corporation's meeting minutes dated November 20, 2023, the Commerce Corporation is supposed to "administer a fair, transparent, and evidence-based challenge process to ensure accurate maps prior to implementation."

52. Cox on multiple occasions has requested access to the Ookla data used by the Commerce Corporation in determining reclassifications to create the Rhode Island Broadband

Map.

53. The Commerce Corporation has refused to produce such data to Cox.

54. Upon information and belief, Ookla may not collect personally identifiable information that can precisely pinpoint a location unless it is voluntarily provided, and therefore, the data that the Commerce Corporation purchased from Ookla may not include precise location data.

55. On June 19, 2024, Cox filed an Access to Public Records Act (APRA) request with the Commerce Corporation for the following information:

- The complete data set and testing results, from Ookla and any other sources, used by Rhode Island Commerce/ConnectRI, or done so by a third party on behalf of Rhode Island Commerce/ConnectRI, to create the Rhode Island Broadband Map that is being used for the state's BEAD Challenge Process.
- Any and all versions of the Rhode Island Broadband Map created by Rhode Island Commerce/ConnectRI, or done so by a third party on behalf of Rhode Island Commerce/ConnectRI drafted between January 1, 2022 to present.
- Any and all information and data used to reclassify locations as served, underserved and unserved including any and all communications (emails, meeting notes, etc.) as they relate to determining the rationale for making reclassification decisions as well as the actual making of the determinations that appear on the Rhode Island Broadband Map being used for the state's BEAD Challenge Process.

56. On July 1, 2024, the Commerce Corporation responded to the APRA request by stating in pertinent part:

As you may be aware, APRA authorizes the Corporation to charge for the cost of searching and retrieving documents at a rate of up to \$15.00 per hour with the first hour free, plus the reasonable actual cost for providing electronic records. See R.I. Gen. Laws § 38-2-4(b). Based on the quantity of documents that would need to be retrieved, reviewed, and redacted, which are estimated to total approximately 206,459 pages, it is estimated that the total length of time required to comply with your request is approximately 3,498.50 hours, of which approximately 58.5 hours will be devoted to document retrieval and approximately 3,440 hours will be committed to reviewing documents for redaction purposes. As APRA provides that the first hour is free, the estimated cost for search, retrieval, and review of documents would total \$52,462.50.

Please remit payment to the Corporation, 315 Iron Horse Way, Suite 101, Providence, RI 02908 c/o Accounting Department, in the amount of \$52,462.50 by certified check or money order and reference your request and this correspondence. Upon receipt of the funds, the Corporation will commence the process necessary to respond to your request. If the actual cost is more than or less than the estimate provided, we will notify you of such difference and as appropriate, either return funds or request that the additional amount be paid to the Corporation.

57. On July 3, 2024, Cox replied to Commerce’s response to the APRA request by inquiring:

[W]hether there is any subset of documents that we requested that would not require 3,440 hours for redaction and 58.5 hours for retrieval. In the short term, we are most interested in the Ookla testing data used to reclassify locations served by Cox. It is our understanding that the Ookla testing data referenced in the first bullet point above is generally data voluntarily provided by users, and to the extent there is any personal data that requires redaction, it can be accomplished by redacting columns in a spreadsheet in an efficient manner. Please let us know if we are correct about this, which types of documents that we requested require redaction, and if there is any data that we requested that is not onerous for your team to provide. In addition, please let us know how many people would be assigned to perform the redactions, so that we can have an estimate of when we would receive the data. Assuming a 40- hour work week, if one person were assigned to complete the task, the current estimate of 3,440 hours for redaction amounts to 86 weeks. Obviously, this timeframe of 86 weeks is well outside the parameters for the BEAD Broadband Challenge Process.

If we were to pay the amount referenced above, what date can we expect to receive all of the requested documents.

58. The Commerce Corporation responded on July 5, 2024, stating in pertinent part that “you may submit a more refined request, and, if you do so, the Corporation will respond pursuant to APRA. If there are costs associated with your request, the Corporation will inform you of them and let you know its estimate on how many hours it will take to comply with your request.”

59. In the Commerce Corporation’s APRA response, it claimed in July 2024 that it would need 3,440 hours to redact information from broadband map materials.

60. Meanwhile, the Commerce Corporation had already represented to NTIA in its Volume 1 proposal in May 2024 that it had designed and implemented the capability to redact personally identifiable information from its broadband maps. As noted on page 45 of the Volume I proposal, the Commerce Corporation had already removed personally identifiable information from the Rhode Island Broadband Maps. On page 48 of the Volume proposal, the Commerce Corporation told NTIA that it will “remove all PII and proprietary information prior to the challenge/rebuttal being posted,” and on page 49, the Commerce Corporation stated that it “is designing the Challenge Portal with multiple layers of security protocols and measures to safeguard PII and proprietary information.”

61. Notwithstanding these representations to NTIA, the Commerce Corporation told Cox that it would need 3,440 hours to redact data; and, as of this filing, it has not provided any data to Cox.

62. The result of the Commerce Corporation’s reclassification of locations is that approximately 30,000 locations found within 238 Census Block Groups currently served by Cox, all of which have 1000 Mbps/35 Mbps available and many of which have 2000 Mbps/100 Mbps available, are incorrectly and improperly reclassified as “underserved.”

63. The window to submit challenges under the Rhode Island Broadband Challenge Process began on June 6, 2024, and ended on July 6, 2024.

64. Cox met or discussed its concerns related to Rhode Island Broadband Challenge Process with the Commerce Corporation on numerous occasions:

- a. On May 31, 2024, two days after the Commerce Corporation published the Rhode Island Broadband Map, Cox had a call with Commerce Corporation representatives to share Cox’s concerns by providing map examples and to try to

understand Commerce Corporation's methodology;

- b. On June 12, 2024, Cox again shared its concerns with the Commerce Corporation;
 - c. On June 17, 2024, Cox met with the Commerce Corporation's President and Chief Operating Officer to share its concerns about the Rhode Island Broadband Map; and
 - d. On June 27, 2024, Cox met with the Rhode Island Secretary of Commerce and the Commerce Corporation Chief Strategy Officer to share its concerns with the Rhode Island Broadband Map.
65. Cox has informed the Commerce Corporation that it is impossible for Cox to fulfil the requirements of the Broadband Map Challenge Process.
66. Cox submitted a written request for a waiver to the Rhode Island Broadband Map challenge process on July 3, 2024.
67. The Commerce Corporation denied Cox's request for a waiver.
68. To submit a challenge under the current Rhode Island Broadband Challenge Process, since Cox has approximately 140,000 locations in the challenged areas, it would need to run 105,000 tests (75% of 140,000) three times, for a total of 315,000 tests.
69. For Cox customers who use a Cox-provided modem, Cox can do the testing remotely. However, a substantial number of the total would need to be done manually, since a significant percentage of Cox customers have their own modems. This means, for example, that for a Census Block Group with 1,000 customers, assuming 30% of Cox customers have their own modem (a number that could be significantly higher because of the random requirement of the challenge process) for the Census Block Group, Cox would have to run a significant portion of the testing by manual, simultaneous tests.

70. To meet the Commerce Corporation's 75% threshold for each impacted Census Block Group, Cox would have to run manual tests on the additional customers who do not use Cox-provided modems. This would require a median of 92 field technicians or an average of 84 technicians, and as high as approximately 288 field technicians, conducting tests simultaneously in each of the 238 census block groups.

71. For each of the 238 census block groups, Cox would be required to dedicate on average 84 technicians to go to 84 of its customers' homes on three separate nights between the hours of 7 p.m. to 11 p.m. to test the customers' internet connections to meet Commerce Corporation's simultaneous testing requirement, and have each of those 84 customers agree to have the Cox technician at their homes at the exact same time so that the test could be performed simultaneously at each of the 84 homes. Cox would be forced to disconnect the customers' internet access to run the test, and would then have to repeat this entire process of three tests on three separate nights between the hours of 7 p.m. to 11 p.m. a total of 238 times within a window of 30 days to meet the Commerce Corporation's irrational testing scheme. This is an impossible task. If one of the 84 customers refused access at their home for a census block group on one of the three nights of testing for that census block group, Cox would not meet the simultaneously testing requirement for that census block group. Under Commerce Corporation's scheme, Cox would have to conduct approximately 59,976 Cox-technician visits at its customers' homes across Rhode Island in a 30-day window between the hours of 7 p.m. to 11 p.m.

72. Even if Cox dedicated every one of its technicians across the country at exorbitant expense to come to Rhode Island, it still could not complete all the testing required by the 75% testing threshold in Volume 1.

73. The makeup of Cox's customer base in the affected areas is much different from

the rationale that the Commerce Corporation relied on to develop their initial Volume I proposal and formed the basis for their approved plan. According to Footnote 11 in the Rhode Island BSL Area Speed Test Pre-Challenge Reclassification Proposal, attached to its Vol. I draft plan released in November 2023 (and attached to this Complaint as Exhibit 3), the Commerce Corporation initially assumed that an ISP would have 12 customers in a census block, meaning it would have to test only 9 customers (without taking into account whether the tests would be done manually by a technician), which the Commerce Corporation described as a “slightly greater number of samples” than the 6 customers that the Commerce Corporation assumed would be used to designate an entire census block as underserved.

74. Upon information and belief, the Commerce Corporation represented to the NTIA that the average ISP would have to test a small number of customers as justification for the 75% testing threshold that is specific to Rhode Island.

75. This assumption is simply not what Cox faces – it is required to test a very large number of customers for each affected area under the current challenge process. In the affected Census Block Groups, Cox has as many as 1,281 served locations and an average of 374 served locations.

76. The number of Cox customers per census block group combined with the Commerce Corporation’s 75% testing threshold and simultaneity requirement have deprived Cox of any meaningful ability to challenge the Rhode Island Broadband Map.

77. On July 6, 2024, Cox submitted as many challenges as possible within the affected census block groups. Given that the Commerce Corporation’s 75% threshold requirement was set so high the attempt at a true random test was hampered, rather than randomly selecting a sample of Cox-provided modems in a given impacted census block group,

Cox opted to test all available Cox-provided modems in each of the impacted census block groups. Due to the variability of the number of overall customers as well as the variability of the number of the customers using the Cox-provided modem in each of the impacted census block groups this resulted in reported testing, on average, of approximately 41 percent of Cox customers in each of the census block groups that required testing – significantly more than required by NTIA’s model challenge process and significantly more than the small number of customers that Cox believes the Commerce Corporation represented to NTIA would be the average number of tests for an internet service provider, but far less than required by the Commerce Corporation’s actual impossible-to-meet challenge standard.

78. Cox reported testing results for, on average, 41 percent of its customers per census block group for the following reasons. Cox used its Gateway Speed Test tool to test Cox-provided Syndicated/Pano devices (Cox-provided modems) because of the practical impossibility of physically going to thousands of its customers’ homes to conduct simultaneous testing between the hours of 7 p.m. to 11 p.m. The Gateway Speed Test tool performs tests from Cox’s servers to the customer’s device. Roughly 74 percent of the devices in Rhode Island fell into this category.

79. Cox’s Gateway Speed Test tool has built-in safeguards that will not allow an excessive number of tests to run simultaneously to protect the network’s integrity and the customers’ user experience. For example, the safeguards could treat such a high number of tests hitting the network at the same time as like a Denial-of-Service Attack (DDoS) and thus block the tests from being completed and harming the customers’ overall user experience. This safeguard is an industry standard and could be prohibitive for any internet service provider trying to attempt similar tests. If the Commerce Corporation adopted the NTIA model challenge with a

testing requirement of 10%, this would not have been an issue. In any event, Cox performed three tests on all Cox-provided Syndicated/Pano devices in the affected areas. Any test failure due to outage, turned off device, polling through Cox's servers, database issues or any number of other reasons would eliminate that device from appearing on the final report. Cox could have conducted additional tests and provided three results for all possible devices. However, Cox was concerned this approach might raise questions about the integrity of its data, as it could allow Cox to selectively present only the top-performing results.

80. Cox made a good faith attempt to work around network safeguards and still accommodate the Commerce Corporation's testing requirements of simultaneous tests by parsing its data into 815 distinct nodes to allow more tests to run concurrently. As mentioned above, Cox's efforts resulted in reported testing, on average, of approximately 41 percent of Cox customers in the affected census block groups.

81. Over 99% of the locations that Cox tested demonstrated speeds over the threshold for "served" at 100/20 and met latency requirements.

82. On information and belief, no other service provider is subject to the same level of testing in Rhode Island or anywhere in the country as Cox in terms of the number and scope of locations required to be tested.

83. The Rhode Island BEAD Broadband Challenge Process is significantly different and exponentially more labor intensive than every other state where Cox offers high-speed internet. Requiring Cox to visit thousands of locations three times and test simultaneously is impossible and would be extremely expensive and burdensome even if it were possible.

84. The purported goal of the Rhode Island Broadband Challenge process is to create an accurate map of served and unserved locations. As of June 30, 2024, the Commerce

Corporation was aware that all Cox customers in Rhode Island were eligible for one (1) gigabit broadband speeds.

85. The 75% testing requirement in areas with large numbers of customers is not necessary or required under statistical modeling. The national model generally requires only 10% testing, and the other states where Cox offers high-speed internet only require 10% testing. Cox reviewed the Volume I proposals of multiple Eligible Entities in other states. Of those sampled, Arizona, Arkansas, California, Connecticut, Georgia, Idaho, Iowa, Kansas, Massachusetts, Nebraska, Nevada, North Carolina, Ohio, Delaware, Maine, New York, New Jersey, Pennsylvania, Vermont, and Virginia all applied the 10% standard set forth in NTIA's BEAD Model Challenge Process.

86. Based on statistical modeling from Cox's data team, Commerce Corporation's 75% testing requirement is completely unnecessary to reach a high degree of statistical certainty of the true percentage of modems meeting their advertised speeds. Cox can reach a high degree of statistical certainty of measuring the true percentage of modems meeting their advertised speed with a sample size of 4% of the Cox customers in Rhode Island. This sample size would have 95% confidence with 95% power to detect the true mean within $\pm 1\%$, both of which are at or above industry standards for statistical tests.

87. In the areas subject to challenge in Rhode Island, the Cox network is capable of offering 1000 Mbps /35 Mbps service. As of June 30, 2024, 99.8% of Cox served homes in Rhode Island were eligible for two (2) gigabit broadband speeds.

88. The allegedly underserved areas on the Commerce Corporation's Broadband Map include some of the most affluent areas of the State. These include the Nayatt neighborhood in Barrington, see Exhibit 4, and the area of Newport with its famous mansions and some of the

most expensive real estate on the east coast. See Exhibit 5.

89. Committing public funds administered by the Commerce Corporation to areas that already have high-speed internet will result in significant overbuilding of served areas, instead of prioritizing adoption and affordability to communities in need, and is inconsistent with the intent of the IJJA.

The Commerce Corporation Uses the Same Flawed Rhode Island Broadband Map for the Capital Projects Fund Program

90. The Capital Projects Fund is a fund administered by the United States Treasury that is authorized by Section 604 of the Social Security Act, as added by ARPA.

91. The United States Treasury awarded Rhode Island \$112.3 million as part of ARPA Capital Projects Fund. The State's General Assembly allocated \$24,956,500 from the Capital Projects Fund for high-speed internet broadband.

92. Like the BEAD program, the Capital Projects Funds is administered in Rhode Island by the Commerce Corporation.

93. The Commerce Corporation issued a Request For Proposals ("RFP") and a set of rules for the Capital Projects Fund with a closing date of August 12, 2024.

94. Upon information and belief, the Commerce Corporation's evidentiary basis for the need for high-speed internet is the same underlying data as used for the Rhode Island Broadband Map. The Commerce Corporation's RFP for the Capital Projects Fund program uses the same methodology for determining internet speed as the BEAD program.

95. As of this filing, the challenge process for the Rhode Island Broadband Map is still underway and has not been resolved. The Commerce Corporation has not shared any testing results with Cox that justify designating areas in Westerly, Newport, and Jamestown as underserved.

96. Nevertheless, the Commerce Corporation has funded the Capital Projects Fund program without a final determination as to whether taxpayer funds are actually needed for the delivery of subsidized high-speed internet in Westerly, Newport, and Jamestown. Upon information and belief, as reflected in the Commerce Corporation’s meeting minutes dated March 25, 2024, the Commerce Corporation had already selected Newport, Jamestown and Westerly as the sole locations for the Capital Projects Fund “based on quality of broadband infrastructure and population” as of March 2024.

97. According to the Commerce Corporation’s RFP for the Capital Projects Fund program, grantees who build broadband infrastructure under the program must agree to provide 100/100 internet service at a price not to exceed \$53.09 per month. The addresses that the Commerce Corporation has selected for this taxpayer-subsidized internet service include some of the wealthiest homes and communities in Rhode Island, including:

- a. Affluent neighborhoods in Westerly;
- b. Approximately 200 homes in Jamestown valued at over \$1 million;
- c. The Breakers Mansion, Rosecliff Mansion, and the Rough Point Mansion and Museum in Newport; and
- d. Other properties in Newport that sold for prices such as \$27 million and \$16 million.

98. The United States Treasury rules for the Capital Projects Fund program state that “Treasury encourages uses of funds that promote strong, equitable growth, including racial equity, in communities with a critical need, such as high-poverty and rural areas. For the purposes of CPF, equity and underserved communities are defined in the Executive Order 13985 On Advancing Racial Equity and Support for Underserved Communities Through the Federal

Government, as issued on January 20, 2021 (EO 13985).”

99. Executive Order 13985 defines “equity” and “underserved communities” as follows:

- a. “The term ‘equity’ means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.”
- b. “The term ‘underserved communities’ refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, as exemplified by the list in the preceding definition of ‘equity.’”

100. The Commerce Corporation’s Capital Projects Fund program shows that, regardless of the results of internet speed data, the Commerce Corporation has already made up its mind to build taxpayer-subsidized internet to wealthy communities in Rhode Island that already have access to high-speed internet. The Capital Projects Fund program in Rhode Island will provide high-speed duplicative internet to Westerly, Newport, and Jamestown at a taxpayer-subsidized price that is not available to residents of lower-income communities in Rhode Island.

101. On August 12, 2024, Cox submitted a letter to the Commerce Corporation that reiterated to the Commerce Corporation that Cox already provides high-speed broadband internet

in Westerly, Newport, and Jamestown and listed its concerns about the Capital Projects Fund RFP in writing. Exhibit 6.

102. On Friday, August 23, 2024, at 5:05 p.m., the Commerce Corporation responded in writing by ignoring the existence of duplicative infrastructure. Exhibit 7. Incredibly, the Commerce Corporation not only defended its illogical and inaccurate determination of broadband need in Rhode Island, but also, after acknowledging that Cox’s challenge was timely, deemed the challenge “untimely.”

Cox’s Petition for Declaratory Order to the Commerce Corporation

103. The Commerce Corporation set July 6, 2024, as the last day to submit challenges to the Rhode Island Broadband Map.

104. On July 6, 2024, Cox submitted a Petition for Declaratory Order to the Commerce Corporation.

105. On July 6, 2024, Cox served the Petition by hand to the physical address of the Commerce Corporation and e-mailed it to rulescoordinator@commerceri.com, the e-mail address listed in the Commerce Corporation’s regulations regarding petitions for a declaratory order. In addition, Cox dropped off the Petition with FedEx on July 6, 2024 for delivery.

106. The Commerce Corporation did not provide a response to Cox’s Petition to Cox on or before September 4, 2024.

107. Secretary Tanner, by and through counsel, e-mailed a response to the Petition to Cox’s counsel on the evening of September 8, 2024, stylized as a “Decision on Request for Declaratory Order.”

COUNT I
DECLARATORY JUDGMENT
(R.I. GEN. LAWS § 9-30-1, R.I. GEN. LAWS §§ 42-35-7 and 42-35-15)

108. Cox re-alleges and incorporates by reference the allegations contained in the

foregoing paragraphs as if fully set forth herein.

109. The Commerce Corporation has set a challenge process and a set of rules for the Rhode Island Broadband Map that is impossible for Cox to meet.

110. The Commerce Corporation has created an illusory right for Cox to challenge the Rhode Island Broadband Map that cannot be obtained.

111. It is impossible for Cox to meet the evidentiary burden in the Commerce Corporation's challenge process for the Rhode Island Broadband Map.

112. Cox respectfully requests that the Court enter a declaratory judgment that:

- a. The current version of the Commerce's Corporation's Rhode Island Broadband Map is arbitrary and capricious and therefore void;
- b. The Commerce Corporation's challenge process is impossible for Cox to meet and a violation of due process and therefore void;
- c. The Commerce Corporation must provide a waiver to Cox from the Commerce Corporation's testing requirements in Section 1.4 of the Commerce Corporation's Broadband Equity, Access, and Deployment (BEAD) Program, Initial Proposal, Volume 1 (May 1, 2024), so that Cox can submit data on 10% of its customers in a census block group, without simultaneous testing;
- d. The Commerce Corporation must provide sufficient time so that Cox's challenges to the Commerce Corporation's Rhode Island Broadband Map are considered timely;
- e. The Commerce Corporation must consider Cox's challenges and thereafter re-adjudicate the Rhode Island Broadband Map; and
- f. The Commerce Corporation has not applied a fair and equitable process to Cox

that will ensure efficient and effective use of Rhode Island’s BEAD funds in a manner consistent with the law and intent of the program.

COUNT II
ACTION UNDER R.I. GEN. LAWS § 42-35-15

113. Cox re-alleges and incorporates by reference the allegations contained in the foregoing paragraphs as if fully set forth herein.

114. Pursuant to R.I. Gen. Laws § 42-35-8(a), “[a] person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency applies to the petitioner.”

115. The Decision is an abuse of discretion.

116. The Rhode Island Broadband Map challenge process is not fair and equitable.

117. The public comment period for Volume 1 ended on December 4, 2023. At the time, the only available broadband maps showed that Cox’s customers in Rhode Island were over 99% served. Cox had no reason to submit comments on the Commerce Corporation’s challenge process based on speed because the existing map at the time showed there was no issue with internet speed.

118. Commerce Corporation added the simultaneity requirement to the challenge process without any opportunity for public comment.

119. Upon information and belief, Commerce Corporation added the 75% testing requirement based on its mistaken assumption and factually false statement to NTIA that an internet service provider like Cox would have to test a small number of customers in an affected area during the challenge process, when in fact Cox was required to test a very large number of customers for each affected area.

120. The Commerce Corporation's challenge process created a testing scheme that was impossible for Cox to meet, unreliable for its stated purpose, and completely unnecessary to establish whether an affected area consisted of served or unserved internet speeds.

121. The entirety of BEAD funding is not at risk as Secretary Tanner claims in the Decision. Other states have revised their BEAD procedures with no impact on awarded federal funding.

122. The only reasonable conclusion in response to Cox's petition was to grant a waiver from the Commerce Corporation's 75% simultaneous testing requirement and to grant an extension of time to submit data.

123. The Decision's statement that Cox had the opportunity to submit a "timely, narrowly tailored waiver" is false. The statement regarding a "timely" waiver pertained to Cox's inability to meet the 75% testing threshold because it would need to arrange for Cox technicians to fan out across Rhode Island to conduct thousands of in person simultaneous testing with customers. The Commerce Corporation notified Cox of this illusory opportunity by email on Friday, July 5, at 5:30 p.m., the day before the window for the challenge period ended on July 6, 2024, which, as Secretary Tanner noted in her Decision, is "the Saturday of Fourth of July weekend." Cox would have had to perform the manual testing in 238 census block groups for customers at their homes on Saturday, July 6, between the hours of 7 p.m. to 11 p.m. It was literally impossible for Cox to propose and implement any proposed "timely" waiver by the following day in response to an e-mail it received after work hours.

124. Contrary to Secretary Tanner's Decision, Cox did not present the Commerce Corporation with conflicting information. After the deadline for the challenge process ended on July 6, 2024, Cox and the Commerce Corporation engaged in communications regarding Cox's

testing that clarified its numbers and percentages. Secretary Tanner omitted those communications from the Decision.

125. Cox informed the Commerce Corporation on many occasions before July 6, 2024 of the challenges it faced with attempting to meet the 75% simultaneous testing requirement. An allegation that the Commerce Corporation was somehow misled is factually false. The Commerce Corporation either knew or should have known the dataset that Cox submitted as part of the challenge process. Cox submitted three sets of speed tests for over 37,000 locations in Rhode Island, and it promptly responded to inquiries from the Commerce Corporation.

126. Cox made many timely requests for relief from the Commerce Corporation's irrational challenge process, including on May 31, 2024, June 12, 2024, June 17, 2024, June 27, 2024, and July 3, 2024. These all occurred after the Commerce Corporation published its Rhode Island Broadband Map for the first time on May 29, 2024.

127. The Commerce Corporation has not communicated to Cox whether it will resolve Cox's challenges submitted on July 6, 2024, based on the merits of those challenges and the unequivocal evidence from Cox that the affected areas are served.

128. Upon information and belief, the Commerce Corporation intends to submit its findings on Cox's existing challenges to the NTIA in October 2024 without informing Cox or the public as to the Commerce Corporation's findings.

129. Secretary Tanner issued the Decision on Request for Declaratory Order (the "Decision") on September 8, 2024. The Decision is not timely. Cox submitted its Petition on July 6, 2024. The Decision did not issue until September 8, 2024, over sixty (60) days later, in violation of R.I. Gen. Laws § 42-35-8(c). The Decision states that "July 6, 2024 was the Saturday of the Fourth of July weekend," and asserts that the Commerce Corporation did not

actually receive a copy of the petition until Monday, July 8, 2024. Cox delivered the petition by hand on July 6, 2024, to the offices of the Commerce Corporation, but the offices were locked, and Cox also emailed the petition in compliance with the Commerce Corporation's regulations. Meanwhile, the Commerce Corporation expected Cox and others to submit challenges to the Rhode Island Broadband Map by July 6, 2024, on the Saturday of the Fourth of July weekend. There is no indication that the Commerce Corporation deemed Cox's challenges as untimely because they were submitted on July 6, 2024.

130. Cox respectfully requests that the Court enter judgment ordering the following relief:

- a. Secretary Tanner's Decision is an abuse of discretion;
- b. An order that prevents the Commerce Corporation from proceeding with the current version of the Rhode Island Broadband Map;
- c. The Commerce Corporation shall provide Cox with a waiver from the Commerce Corporation's testing requirements in Section 1.4 of the Commerce Corporation's Broadband Equity, Access, and Deployment (BEAD) Program, Initial Proposal, Volume 1 (May 1, 2024), so that Cox can submit data on 10% of its customers in a census block group, without simultaneous testing;
- d. The Commerce Corporation shall provide Cox an extension of time so that Cox's challenges to the Commerce Corporation's Rhode Island Broadband Map will be considered timely;
- e. The Commerce Corporation shall consider Cox's challenges and thereafter re-adjudicate the Rhode Island Broadband Map; and
- f. The Commerce Corporation shall provide Cox a fair and equitable process that

will ensure efficient and effective use of Rhode Island's BEAD funds in a manner consistent with the law and intent of the program.

COUNT III
INJUNCTION

131. Cox re-alleges and incorporates by reference the allegations contained in the foregoing paragraphs as if fully set forth herein.

132. The challenge process to the Rhode Island Broadband Map from the Commerce Corporation is unenforceable as arbitrary, capricious and contrary to law, and violative of procedural due process.

133. The Commerce Corporation has acted in an arbitrary and capricious manner by requiring a 75% testing requirement for the Rhode Island Broadband Map, and by requiring that testing be conducted simultaneously.

134. Cox will suffer immediate and irreparable harm if the Commerce Corporation's rule imposing a 75% simultaneous testing requirement for the Rhode Island Broadband Map is allowed to stand, and Cox has no adequate remedy at law.

135. The balance of equities and public interest favors the issuance of an injunction to temporarily, preliminarily and permanently enjoin the Commerce Corporation from a 75% testing requirement for the Rhode Island Broadband Map.

136. Cox is entitled to a preliminary and permanent injunction that enjoins the Commerce Corporation from:

- a. Requiring Cox to comply with the Commerce Corporation's testing requirements in Section 1.4 of the BEAD Program, Initial Proposal, Volume 1 (May 1, 2024), that require data on 75% of its customers in a census block group with simultaneous testing;

- b. Refusing to consider Cox’s challenges to the Rhode Island Broadband Map based on timeliness grounds; and
- c. Proceeding with the current version of the Rhode Island Broadband Map until such time as the Commerce Corporation has Cox’s challenges and thereafter re-adjudicating the Rhode Island Broadband Map.

COUNT IV

**DECLARATORY JUDGMENT AND ACTION UNDER R.I. GEN. LAWS § 42-35-15
(R.I. GEN. LAWS § 9-30-1, R.I. GEN. LAWS §§ 42-35-7, 42-35-8, and 42-35-15)**

137. Cox re-alleges and incorporates by reference the allegations contained in the foregoing paragraphs as if fully set forth herein.

138. On September 8, 2024, Secretary Tanner e-mailed a response to Cox’s Petition for Declaratory Order to the Commerce Corporation styled as a “Decision on Request for Declaratory Order” (hereafter’ the “Decision.”).

139. The Decision is signed by Secretary Tanner in the following manner: “Elizabeth M. Tanner, Esq., Secretary of Commerce.”

140. From the time that Cox served the Petition on July 6, 2024, to the date of the Decision on September 8, 2024, there are no publicly-available meeting agendas or meeting minutes of the Board of Directors of the Commerce Corporation that indicate the Board of Directors voted on, was advised of, or otherwise authorized the issuance of the Decision.

141. Upon information and belief, Secretary Tanner did not advise the Board of Directors of the Commerce Corporation as to the existence of Cox’s Petition for Declaratory Order.

142. Upon information and belief, the Board of Directors of the Commerce Corporation did not vote on, advise Secretary Tanner regarding the Decision, or otherwise

authorize Secretary Tanner to issue the Decision.

143. The Secretary of Commerce is not the Commerce Corporation. By law, under R.I. Gen. Laws § 42-64-8(a), the powers of the Commerce Corporation are vested in a Board of Directors consisting of thirteen (13) members.

144. Upon information and belief, the Board of Directors of the Commerce Corporation has not authorized the Secretary of Commerce to issue a decision in response to a petition for declaratory order brought under R.I. Gen. Laws § 42-35-8.

145. Cox respectfully requests that the Court enter judgment ordering the following relief:

- a. The Board of Directors of the Commerce Corporation must authorize a response to a petition for declaratory order brought under R.I. Gen. Laws § 42-35-8; and
- b. Secretary Tanner's Decision on Request for Declaratory Order is void and has no legal effect as it is not authorized by the Board of Directors.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff Cox respectfully requests that the Court:

- a. Enter judgment in favor of the Plaintiff on all claims in this Complaint, order relief for Plaintiff as prayed in each count of the Complaint, and award Plaintiff its attorneys' fees, and costs;
- b. Enter a declaratory judgment as prayed in Counts I and IV of this Complaint;
- c. Sustain Plaintiff's actions for relief in Count II and Count IV of the Complaint and order the relief as prayed;
- d. Enter an injunction as prayed in Count III of this Complaint; and

e. Grant Plaintiff such other and further relief as the Court may deem just and proper.

Plaintiff,

**COXCOM, LLC, d/b/a COX
COMMUNICATIONS,**

By its Attorneys,

/s/ Robert Clark Corrente

/s/ Joseph D. Whelan

/s/ Timothy K. Baldwin

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Dated: September 23, 2024

WC108374