STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 7, 2024)

CoxCom LLC, d/b/a COX COMMUNICATIONS	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2024-05211**
	:	
RHODE ISLAND COMMERCE CORPORATION	:	
Defendant.	:	

DECISION

STERN, J. This Court formally raised the issue of subject-matter jurisdiction *sua sponte* and requested additional briefing from the parties after Defendant, Rhode Island Commerce Corporation, brought the issue forward in its Objection to Plaintiff's, CoxCom LLC, d/b/a Cox Communications, Motion for Expedited Discovery. This Court will now determine if it has subject-matter jurisdiction to hear Plaintiff's claim.

I

Facts and Travel

A. The Broadband Equity, Access, and Deployment Program

On November 15, 2021, President Joe Biden signed the Infrastructure Investment and Jobs Act ("IIJA"). 47 U.S.C.A. §§ 1701, 1702. The IIJA established a grant program called the Broadband Equity, Access, and Deployment Program ("BEAD"), which provided the Assistant Secretary of Commerce for Communications and Information ("Assistant Secretary") with authority to distribute almost $42.5 billion throughout the fifty states. 47 U.S.C.A. § 1702(b). However, the Assistant Secretary's powers were not unlimited. Congress integrated two significant

requirements before the Assistant Secretary could distribute grants. *Id.* First, Congress required the Assistant Secretary's grants to target the unserved or underserved areas in a state with high costs for installing broadband services. *Id.*; *see also id.* § 1702(a)(2)(G). Second, Congress conditioned distribution of BEAD funds on the Assistant Secretary's approval of a state's application. *Id.* § 1702(c)(4).

To complete an application for BEAD funds, a state must submit a letter of intent, an initial proposal, and a final proposal for the Assistant Secretary's approval. *Id.* The letter of intent is the first step, providing the Assistant Secretary with a state's current plan for improving broadband services in its jurisdiction. *Id.* § 1702(e)(1)(B). After the letter of intent, a state can submit a more detailed form called an initial proposal. *Id.* § 1702(e)(3). An initial proposal identifies a state's objectives for broadband services, a plan for integrating broadband services regionally with local governments, and unserved or underserved locations. *Id*. Once the Assistant Secretary approves the initial proposal, a state can submit its final proposal, which provides the Assistant Secretary with the state's allocation of BEAD funds, plan for deploying broadband services, and oversight for working with local governments and private entities, among other requirements. *Id.* § 1702(e)(4).

Given the involvement of local governments and private entities, the IIJA allows municipalities and private entities to challenge a state's classification of an area as unserved or underserved. *Id.* § 1702(h)(2)(A). Before submitting the final proposal, states must provide "a transparent, evidence-based, and expeditious challenge process" for local governments and internet service providers to challenge the state's classification of an area as unserved or underserved. *Id.* All successful challenges require the state to update its initial proposal and resubmit it to the Assistant Secretary for approval. *Id*. § 1702(h)(2)(C). A state can then draft and

submit its final identification of the unserved and underserved regions in its jurisdiction for the Assistant Secretary's approval. *Id.* § 1702(h)(2)(B).

B. The Commerce Corporation's Requirements

Rhode Island Commerce Corporation ("State" or "Commerce Corporation") followed the IIJA's procedure for receiving BEAD funds. The State submitted its letter of intent on July 5, 2022, sent its initial proposal on October 27, 2023, and received the Assistant Secretary's approval on May 5, 2024. (Def.'s Mem. in Opp'n Pl.'s Mot. for Expedited Disc., at 9-10 (Def.'s Mem.)) Before the Commerce Corporation could submit its final proposal, it opened the challenge process for thirty days, starting on June 6, 2024, as required by 47 U.S.C.A. § 1702(h)(2)(A). *Id.* at 10.

The Commerce Corporation's challenge process requires broadband service providers to test the internet speed of 75 percent of all customers before hearing a challenge. (Compl. ¶¶ 71-72.) CoxCom LLC ("Cox Communications") raised concerns about the Commerce Corporation's challenge process requirements four times. *Id.* ¶ 64. Cox Communications alleges that the Commerce Corporation's 75 percent requirement means that Cox Communications must visit 59,976 customers within the challenge process's thirty-day window. *Id.* ¶¶ 71-72. Cox Communications claims that this is impossible. *Id.* On May 31, 2024, Cox Communications expressed concerns about the Commerce Corporation's initial proposal to its representatives. *Id.* ¶ 64. Cox Communications repeated its concerns on June 12, 2024, June 17, 2024, and June 27, 2024. *Id.* During that time, Cox Communications spoke with the Commerce Corporation's President and Chief Operating Officer, the Rhode Island Secretary of Commerce, and the Commerce Corporation's Chief Strategy Officer. *Id.* However, Cox Communications received no relief. (Pl.'s Reply Mem. in Supp. of its Mot. for Expedited Disc., at 7.)

Cox Communications first sought to waive Commerce Corporation's challenge process requirements and then attempted to satisfy the requirements. (Def.'s Mem. at 11.) On July 3, 2024, three days before the challenge process closed, Cox Communications e-mailed Rhode Island's Secretary of Commerce a letter requesting a waiver of the Commerce Corporation's challenge requirements. *Id.* at 10. After the Commerce Corporation denied Cox Communications' waiver, Cox Communications attempted to satisfy the Commerce Corporation's challenge requirements by submitting speed test results to the Commerce Corporation on July 6, 2024. *Id.* at 11.

C. Procedural Posture

Cox Communications filed suit against the Commerce Corporation on September 23, 2024 (Docket) alleging that the Commerce Corporation's challenging process set an impossible standard for Cox Communications to satisfy. (Compl. ¶ 123.) Cox Communications asked this Court for declaratory and injunctive relief. *See id.* ¶¶ 113-145. Simultaneously, Cox Communications sought expedited discovery. (Docket.) The Commerce Corporation filed an Objection, where it questioned whether this Court had subject-matter jurisdiction to hear the case at all. (Def.'s Mem. at 13.) This Court heard the parties' argument on October 11, 2024. (Docket.) Subsequently, the Court formally raised the issue of subject-matter jurisdiction *sua sponte*, ordering additional briefing from the parties related to subject-matter jurisdiction. (Docket); *see Rogers v. Rogers*, 18 A.3d 491, 493 (R.I. 2011) ("Because subject-matter jurisdiction is 'an indispensable ingredient of any judicial proceeding,' it can be raised *sua sponte* by the court.") (quoting *Paolino v. Paolino*, 420 A.2d 830, 833 (R.I. 1980)).

II

Standard of Review

Subject-Matter Jurisdiction (Rule 12(b)(1) of the Superior Court Rules of Civil Procedure)

"A motion under Rule 12(b)(1) questions a court's authority to adjudicate a particular controversy before it." *Boyer v. Bedrosian*, 57 A.3d 259, 270 (R.I. 2012). "'In ruling on a Rule 12(b)(1) motion, a court is not limited to the face of the pleadings.'" *Id.* (quoting *Morey v. State of Rhode Island*, 359 F. Supp. 2d 71, 74 (D.R.I. 2005)). "'A court may consider any evidence it deems necessary to settle the jurisdictional question.'" *Id.* (quoting *Morey*, 359 F. Supp. 2d at 74). "[S]ubject-matter jurisdiction is 'an indispensable ingredient of any judicial proceeding.'" *Rogers*, 18 A.3d at 493 (quoting *Paolino*, 420 A.2d at 833). "Accordingly, subject-matter jurisdiction cannot be 'waived nor conferred by consent of the parties.'" *Id.* (quoting *Paolino*, 420 A.2d at 833).

III

Analysis

The precise question presented is whether Congress has prevented this Court from hearing the present matter through an express provision in the IIJA, 47 U.S.C.A. § 1702. The relevant clause states, "[t]he United States District Court for the District of Columbia shall have *exclusive jurisdiction* to review a decision of the Assistant Secretary made under this section." 47 U.S.C.A. § 1702(n)(1) (emphasis added). This Court holds that, through this language, Congress has stripped state courts of jurisdiction.

"[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The United States Supreme Court has stated, "[w]e have

recognized a 'deeply rooted presumption in favor of concurrent state court jurisdiction' over federal claims." *Atlantic Richfield Co. v. Christian*, 590 U.S. 1, 15 (2020) (quoting *Tafflin*, 493 U.S. at 458-59). States may exercise concurrent jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). "Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). "Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction." *Claflin*, 93 U.S. at 137. Congress "may confine jurisdiction to the federal courts either explicitly or implicitly." *Gulf Offshore Co.*, 453 U.S. at 478. However, "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Id.* at 479. Permissive language, like the use of the word "may," is insufficient to strip state courts of concurrent jurisdiction. *See Tafflin*, 493 U.S. at 460-61.

Here, the plain language of the statute is unmistakably mandatory, firmly stating that the D.C. District Court "*shall have exclusive jurisdiction* to review a decision of the Assistant Secretary made under this section." 47 U.S.C.A. § 1702(n)(1) (emphasis added).[1] In his concurrence, Justice Scalia opined that "[i]n the standard fields of *exclusive federal jurisdiction*, the governing statutes specifically recite that suit may be brought 'only' in federal court … [or]

[1] *See Litgo New Jersey Inc. v. Commissioner New Jersey Department of Environmental Protection*, 725 F.3d 369, 395 (3d Cir. 2013) (holding that a clause stating that claims "'shall be brought' in a 'district court'… is most naturally read as a mandate; the suit *must* be brought in a district court"); *see also Maine Community Health Options v. United States*, 590 U.S. 296, 311 (2020) ('"When,'… Congress 'distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty.'") (internal quotation omitted).

that the jurisdiction of the *federal courts shall be 'exclusive*[.]'" *Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) (emphasis added). Justice Scalia specifically cites to the Securities Exchange Act of 1934 as an example, which states, "[t]he district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States *shall have exclusive jurisdiction* of violations of this chapter or the rules and regulations thereunder[.]" *Id.*; 15 U.S.C.A. § 78aa (emphasis added). Importantly, the Supreme Court has unanimously agreed with Justice Scalia, holding that "federal courts have exclusive jurisdiction over 1934 Act claims[.]" *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 583 U.S. 416, 419 (2018).

The 1934 Act and IIJA contain nearly identical exclusivity language with each commanding that the federal courts "shall have exclusive jurisdiction." 15 U.S.C.A. § 78aa; 47 U.S.C.A. § 1702(n)(1); *see also Atlantic Richfield Co.*, 590 U.S. at 13 (stating that the Superfund statute, 42 U.S.C. § 9601, "provides that 'the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter,' so state courts lack jurisdiction over such actions"); *Litgo New Jersey Inc. v. Commissioner New Jersey Department of Environmental Protection*, 725 F.3d 369, 395 (3d Cir. 2013) (holding that federal courts had exclusive jurisdiction where the Resource Conservation and Recovery Act stated that "claims 'shall be brought' in a 'district court'"). Therefore, consistent with precedent, this Court holds that Congress has removed state court jurisdiction by explicit statutory directive for any decision of the Assistant Secretary made under this statute. Said differently, though state courts would normally have jurisdiction alongside federal courts, Congress has removed jurisdiction from this Court, and other state courts, through the exclusivity clause.

The next question is whether Cox Communications' claims are within the scope of the exclusivity clause. Specifically, this Court must determine whether the alleged flaws in the

challenge process require review of a decision by the Assistant Secretary. The plain language of the statute leaves this Court with no doubt that this dispute is squarely within the bounds of the exclusivity clause. Multiple sections inform the Court's decision. First, the Assistant Secretary approves or disapproves each state's initial proposal based on factors laid out within the statute. 47 U.S.C.A. § 1702(e)(3)(D). Second, the Assistant Secretary must approve or disapprove each state's final proposal. 47 U.S.C.A. § 1702(e)(4)(D). Third, during the challenge process, a state must notify the Assistant Secretary of *any* modification to the initial proposal. 47 U.S.C.A. § 1702(h)(2)(C). Fourth, the Assistant Secretary may modify the challenge process as necessary and may reverse determinations made by the states with respect to the eligibility of a particular location or community. 47 U.S.C.A. § 1702(h)(2)(D).

Cox Communications argues that they are not challenging a decision by the Assistant Secretary, and this Court should have subject matter jurisdiction over the claim. Cox Communications attempts to thread the needle between the approvals of the initial proposal and the final proposal by the Assistant Secretary, hoping to find a brief window where this Court possesses subject-matter jurisdiction. However, no such window exists. As cited above, the Assistant Secretary must approve the initial proposal (and has approved the initial proposal), any changes to the initial proposal, and the final proposal, all while maintaining the ability to modify the challenge process and to reverse determinations made by the states throughout the challenge process. No window exists where the challenge process is not under the exclusive purview of the Assistant Secretary. The initial proposal has already been approved by the Assistant Secretary. Any modification to the challenge process ordered by this Court would require review and approval by the Assistant Secretary. Further, the Assistant Secretary could take action to modify the challenge process completely independent of any court's intervention. Finally, the Assistant

Secretary's approval or disapproval of the final proposal looms over any modification ordered by the Court; any action the Court ordered would be subject to review by the Assistant Secretary and could result in the Assistant Secretary rejecting a change ordered by this Court. This need for the Assistant Secretary's approval clearly illustrates why Congress elected to include the exclusivity clause. Therefore, this Court lacks subject-matter jurisdiction.

This Court cannot reach the merits of Cox Communications' claim, but Cox Communications is not left without a remedy. Cox Communications is simply in the wrong court and may pursue a remedy in the United States District Court for the District of Columbia.[2]

IV

Conclusion

Based on the foregoing, this case must be dismissed for lack of subject-matter jurisdiction. Commerce Corporation's counsel shall prepare the appropriate order and separate judgement.

[2] Still, the allegations in Cox Communications' Complaint give this Court pause and, assuming the allegations in the Complaint are true, this Court appreciates Cox Communications' concerns related to the challenge process and the Rhode Island map. If true, these concerns would mean that funds intended to provide broadband infrastructure to unserved and underserved areas are instead going to be used in areas that already have sufficient broadband infrastructure, and no challenge to that plan was possible.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**CoxCom LLC, d/b/a Cox Communications v. Rhode Island Commerce Corporation**
CASE NO:	**PC-2024-05211**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 7, 2024**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Joseph D. Whelan, Esq.** **Timothy K. Baldwin, Esq.** **Robert Corrente, Esq.**
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